Filed 3/19/09 In re Z.T. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re Z.T., a Person Coming Under the Juvenile Court Law.	B210753 (Los Angeles County Super. Ct. No. CK65352)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. A.N., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Donna Levin, Commissioner. Affirmed.

Lee Gulliver, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Kim Nemoy, Senior Deputy County Counsel, for Respondent.

INTRODUCTION

After the juvenile court had set a Welfare and Institutions Code section 366.26[1] hearing on selection and implementation of a permanent plan for dependent Z.T., his mother, defendant and appellant A.N. (mother), filed a request for change in order under section 388 arguing that the juvenile court should have ordered an assessment of Z.T.'s maternal grandmother for possible placement with the grandmother as guardian. The juvenile court denied the section 388 request, terminated parental rights, and freed Z.T. for adoption.

On appeal, mother argues that the juvenile court abused its discretion when it denied her section 388 request. According to mother, the juvenile court had a legal duty under section 361.3 to order an assessment of the maternal grandmother for placement—both prior to disposition and prior to the placement of Z.T. with his prospective adoptive family—but failed to comply with that duty. Mother argues that it was therefore an abuse of discretion not to rectify those failures by granting her section 388 request.

We hold that, to the extent mother's challenge on appeal is based on the juvenile court's purported legal error in failing to order assessment of the maternal grandmother prior to disposition and initial placement with Z.T.'s prospective adoptive family, she has forfeited those legal issues on appeal. In the alternative, mother's challenge to the failure to order assessment prior to disposition is untimely due to mother's failure to pursue timely writ relief. We further hold that the juvenile court did not abuse its discretion by denying the section 388 request on the grounds that it failed to raise new facts or new circumstances and failed to demonstrate that the requested order would be in Z.T.'s best interests. We therefore affirm the orders from which mother appeals.

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

On March 6, 2008, the Los Angeles County Department of Children and Family Services (DCFS) placed Z.T. in protective custody after mother violated the terms of her voluntary family maintenance plan[2] by missing classes and drug tests at her drug treatment program and testing positive for methamphetamine and amphetamine. Mother had an extensive criminal history, including arrests for assault with a deadly weapon, burglary, forgery, and possession for sale of a controlled substance. In 1999, she was convicted of possession of cocaine base for sale and sentenced to 270 days in jail and 36 months probation.

On March 11, 2008, DCFS filed a section 300 petition alleging that mother had "a history of substance abuse and [was] a current user of amphetamine and methamphetamine [which rendered] mother incapable of providing regular care for [Z.T.]" DCFS further alleged that Z.T.'s older brother was "a current dependent in the Juvenile Court, due to mother's substance abuse." DCFS concluded that mother's substance abuse endangered Z.T.'s "physical and emotional health and safety and create[d] a detrimental home environment, placing [Z.T.] at risk of physical and emotional harm and damage." DCFS also alleged that Z.T.'s father had failed to provide Z.T. with the necessities of life and that father's whereabouts were unknown.

At the March 11, 2008, detention hearing, mother's counsel advised the juvenile court as follows: "There are numerous relatives mentioned [in the detention report]. I don't understand why this minor is in foster care. We have five potential placements mentioned [in the detention report] and none of those people are present today, but DCFS

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[2] Mother entered into a voluntary maintenance plan contract with DCFS at the time Z.T. was born because she was involved in an ongoing dependency proceeding concerning Z.T.'s half-brother who had been removed from mother's custody due to her drug use. The proceeding involving Z.T.'s half-brother was eventually dismissed after the juvenile court awarded sole legal and physical custody of the half-brother to his father.

still needs to do an investigation to see if the baby [Z.T.] can be placed with any of those possible caretakers."[3] The juvenile court found that DCFS had established a prima facie case for detaining Z.T. and showing that Z.T. was a person described in section 300, subdivisions (b) and (g). The juvenile court further found that a substantial danger existed to the physical and emotional health of Z.T. and that there were no reasonable means to protect Z.T. without removal from his parents' home. The juvenile court vested DCFS with temporary placement and custody of Z.T. pending disposition. DCFS was granted discretion to release Z.T. to any appropriate relative, and Z.T. was ordered detained in shelter care. Prior to the jurisdiction/disposition hearing, DCFS investigated Z.T.'s paternal aunts as possible placements for Z.T., but one would not agree to placement and the other was found unsuitable because she was on probation for drug-related offenses.

At the May 16, 2008, jurisdiction/disposition hearing, the juvenile court sustained the petition finding true all three counts, i.e., b-1, b-2, and g-1. Z.T. was declared a dependent of the juvenile court, custody was taken from mother and father, and Z.T. was placed in the care of DCFS for suitable placement. The juvenile court denied mother and father reunification services, set the matter for a hearing under section 366.26 for approval of a permanent plan, and ordered DCFS to prepare an adoptive home study.

In the report for the September 12, 2008, section 366.26 hearing, DCFS indicated that on June 17, 2008, Z.T. had been removed from his original placement and placed with a family interested in adopting him. DCFS reported that prospective adoptive parents were committed to adopting Z.T., had an approved home study, and there were no foreseeable impediments to adoption. DCFS also reported that shortly after Z.T. had been placed with his prospective adoptive family, the maternal grandmother, who had been visiting Z.T. once a week, expressed an interest in having Z.T. placed with her,

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[3] The detention report listed the name and address of Z.T.'s paternal grandmother, paternal aunt, and paternal uncle, as well as the name of a male friend of mother's with whom she had lived.

informing DCFS that she was gainfully employed,[4] in the process of obtaining a residence, and had made many life changes since her years as a drug addict. The maternal grandmother, however, had a lengthy criminal history, including drug, child endangerment, prostitution, and solicitation charges. At the maternal grandmother's request, DCFS agreed to reconsider the effect of her criminal record to determine if it could be waived. DCFS concluded that although it was currently considering the maternal grandmother for placement, it was "questionable" whether her criminal history would be waived and, even if it was waived, it was "questionable whether [the maternal grandmother was] appropriate for placement." Accordingly, DCFS recommended that the juvenile court move forward with terminating parental rights.

On September 3, 2008, prior to the filing of the section 366.26 report, mother filed a request for change of court order under section 388 that requested the juvenile court to rescind its order for an adoptive home study, place Z.T. with the maternal grandmother, and set a hearing under section 366.26 to order guardianship for Z.T. by the maternal grandmother. According to mother's section 388 request, at the time the juvenile court denied mother reunification services—i.e., at disposition—it failed to explore a relative placement option with the maternal grandmother.

At the September 12, 2006, section 366.26 hearing, the juvenile court denied mother's section 388 request without taking argument, stating, "I am not going to grant the [section] 388 [motion] . . . . The request does not state new facts or a change in circumstances. It is denied. The [section] 388 [motion] is denied; so I am going to go forward then [with the hearing under section 366].26"[5] The juvenile court then

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[4] DCFS reported that the maternal grandmother subsequently admitted that she was not employed.

[5] The minute order for the September 12, 2008, hearing on mother's section 388 request states that the request was also denied because "[t]he best interest of [Z.T.] would not be promoted by [the] proposed change of order."

terminated the parental rights of mother and father, freed Z.T. for adoption, and designated the current foster parents as prospective adoptive parents.

On September 15, 2008, mother filed a notice of appeal from the juvenile court's September 12, 2008, findings and orders terminating her parental rights and denying her section 388 request.

DISCUSSION

A. Standard of Review

Mother's challenge to the juvenile court's denial of her section 388 request is governed by an abuse of discretion standard of review. "Th[e] . . . determination [of whether to change a custody order is] committed to the sound discretion of the juvenile court, and the trial court's ruling should not be disturbed on appeal unless an abuse of discretion is clearly established. (*In re Michael B.* (1992) 8 Cal.App.4th 1698 [11 Cal.Rptr.2d 290]; *In re Corey* (1964) 230 Cal.App.2d 813, 832 [41 Cal.Rptr. 379].) As one court has stated, when a court has made a custody determination in a dependency proceeding, '"a reviewing court will not disturb that decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]."' (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 421 [159 Cal.Rptr. 460]; see *In re Mark V.* (1986) 177 Cal.App.3d 754, 759 [225 Cal.Rptr. 460] [accord]; see also *Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 831 [284 Cal.Rptr. 839].) And we have recently warned: 'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 272 [279 Cal.Rptr. 576, 807 P.2d 418], quoting *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479 [243 Cal.Rptr. 902, 749 P.2d 339].)" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

B. Forfeiture and Untimeliness

DCFS argues that, to the extent mother's appeal is based on the juvenile court's purported legal error in failing to order an assessment of the maternal grandmother for placement prior to the May 16, 2008, disposition order and prior to the June 17, 2008, placement of Z.T. in the adoptive parents' home, mother has forfeited those challenges on appeal by failing to raise them with the trial court. In a related argument, DCFS also contends that mother's legal challenge to the juvenile court's failure to order an assessment of the maternal grandmother prior to disposition is untimely because it was not raised by a writ petition for extraordinary relief following the order setting the matter for a section 366.26 hearing.

We agree with DCFS. Although mother purports to challenge on appeal the trial court's denial of her section 388 request, much of her argument centers on section 361.3 and the juvenile court's purported failure to order assessment of the maternal grandmother prior to disposition and prior to placement of Z.T. with his adoptive family. But mother failed to raise the assessment issue with the juvenile court at either the time of disposition or the placement of Z.T. with his adoptive family.

"It is true that . . . a reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. (*People v. Saunders* (1993) 5 Cal.4th 580, 589–590 [20 Cal.Rptr.2d 638, 853 P.2d 1093].) (Footnote omitted.) The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. (*Saunders*, at p. 590.) [¶] Dependency matters are not exempt from this rule. (See, e.g., *In re Dakota S.* (2000) 85 Cal.App.4th 494, 502 [102 Cal.Rptr.2d 196] [failure to obtain supervising agency's assessment of prospective guardian under § 366.22, subd. (b)]; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1338–1339 [63 Cal.Rptr.2d 562] [failure to request court to order bonding study]; *In re Kevin S.* (1996) 41 Cal.App.4th 882, 885–886 [48 Cal.Rptr.2d 763] [failure to challenge setting of § 366.26 permanency planning hearing when court determined that no reasonable reunification efforts were made].)" (*In re S. B.* (2004) 32 Cal.4th 1287, 1293.)

"But application of the forfeiture rule is not automatic. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394 [149 Cal.Rptr. 375, 584 P.2d 512]; see *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [69 Cal.Rptr. 2d 917, 948 P.2d 429] [party's failure to object in trial court does not deprive appellate court of authority].) But the appellate court's discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue. (See *Canaan v. Abdelnour* (1985) 40 Cal.3d 703, 722, fn. 17 [221 Cal.Rptr. 468, 710 P.2d 268]; *Hale v. Morgan, supra,* at p. 394.) Although an appellate court's discretion to consider forfeited claims extends to dependency cases (*Rosa S. v. Superior Court* (2002) 100 Cal.App.4th 1181, 1188 [122 Cal.Rptr.2d 866]; *Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450, 1459 [118 Cal.Rptr.2d 118]), the discretion must be exercised with special care in such matters. 'Dependency proceedings in the juvenile court are special proceedings with their own set of rules, governed, in general, by the Welfare and Institutions Code.' (*In re Chantal S.* (1996) 13 Cal.4th 196, 200 [51 Cal.Rptr.2d 866, 913 P.2d 1075].) Because these proceedings involve the well-being of children, considerations such as permanency and stability are of paramount importance. (§ 366.26.)" (*In re S.B., supra,* 32 Cal.4th at p. 1293.)

In this case, mother did not raise the duty to assess issue with the juvenile court at the disposition hearing, thereby depriving the court of the ability to correct any alleged legal error. Similarly, she did not raise the issue with the juvenile court at the time Z.T.'s initial foster care placement was changed to placement with his prospective adoptive parents, once again depriving the court of the opportunity to correct any error. Mother therefore forfeited her challenges on appeal to the purported failure of the juvenile court to order assessment of the maternal grandmother at those stages of the proceeding.

Moreover, even assuming, arguendo, mother had not forfeited her challenge based on the juvenile court's purported failure to order assessment at disposition, her challenge on that basis is not cognizable on appeal because mother failed to pursue timely extraordinary writ review. Section 366.26, subdivision (l) provides in pertinent part: "(l)(1) An order by the court that a hearing pursuant to this section be held is not appealable at any time unless all of the following apply: (A) A petition for extraordinary

writ review was filed in a timely manner. (B) The petition substantively addressed the specific issues to be challenged and supported that challenge by an adequate record. (C) The petition for extraordinary writ review was summarily denied or otherwise not decided on the merits. (2) Failure to file a petition for extraordinary writ review within the period specified by rule, to substantively address the specific issues challenged, or to support that challenge by an adequate record shall preclude subsequent review by appeal of the findings and orders made pursuant to this section."

"In *Charmice G.* [(1998) 66 Cal.App.4th 659], we held that a party cannot challenge by appeal at any time the decision to set a section 366.26 hearing if the party does not comply with subdivision (l)(1)(A) and (B). (66 Cal.App.4th at p. 671; accord, *Anthony D. v. Superior Court* (1998) 63 Cal.App.4th 149, 158 [73 Cal.Rptr.2d 479]; *Wanda B. v. Superior Court* (1996) 41 Cal.App.4th 1391, 1395 [49 Cal.Rptr.2d 175]; *Joyce G. v. Superior Court* (1995) 38 Cal.App.4th 1501, 1507 [45 Cal.Rptr.2d 805]; *Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 812, fn. 5 [41 Cal.Rptr.2d 731].) We also held that an order setting a section 366.26 hearing is a nonappealable order. (*In re Charmice G., supra*, 66 Cal.App.4th at p. 666.) [¶] Section 366.26, subdivision (l), applies to all 'issues arising out of the contemporaneous findings and orders made by a juvenile court in setting a section 366.26 hearing.' (*Wanda B. v. Superior Court, supra*, 41 Cal.App.4th 1391, 1396.) This includes issues based upon the denial of a parent's section 388 petition where a reversal of such denial would require vacation or reversal of the setting order itself. (*In re Charmice G., supra*, 66 Cal.App.4th at p. 670.)" (*In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1021-1022.)

Here, the juvenile court set the matter for a section 366.26 hearing without ordering the relative placement assessment that mother claims was statutorily required at that time. She was therefore obligated to seek relief from the juvenile court's purported legal error by filing the required writ petition for extraordinary relief. Her failure to do so precludes her from raising that legal challenge on appeal.

C. Section 388 Request

Mother contends that the juvenile court abused its discretion when it refused to grant a hearing on her section 388 request for a change in court orders. According to mother, she presented the requisite new facts or change in circumstances and affirmatively demonstrated that the requested change in court orders would be in Z.T.'s best interests. We disagree.

Section 388 provides in pertinent part: "Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court."

"At a hearing on a motion for change of placement, the burden of proof is on the moving party to show by a preponderance of the evidence that there is new evidence or that there are changed circumstances that make a change of placement in the best interests of the child. (§ 388; *In re Audrey D.* (1979) 100 Cal.App.3d 34, 45 [160 Cal.Rptr. 802]; Cal. Rules of Court, rule 1432(f).) [¶] After the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point 'the focus shifts to the needs of the child for permanency and stability' (*In re Marilyn H.*[(1993)] 5 Cal.4th 295, 309), and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. (*Id.*, at p. 302.) A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child." (*In re Stephanie M., supra*, 7 Cal.4th at p. 317.)

By statute, mother's request under section 388 could only be based on new facts or changed circumstances. It could not be based on purported legal errors made by the juvenile court at disposition or change of placement stages of the proceeding. Thus, even assuming, arguendo, the juvenile court committed legal error by not ordering assessment

of the maternal grandmother at disposition or a change of placement, that error could not be raised as the basis for a change in court order under section 388. Rather, the two-pronged focus under that section is (i) the existence of new facts or changed circumstances and (ii) whether the requested change in order is in the child's best interests.

Mother asserts that her declaration in support of her section 388 request raised new facts, i.e., her desire to have Z.T. placed with the maternal grandmother in the event mother could not care for him. As evidence of this fact, mother attached to her section 388 request an exhibit granting the maternal grandmother guardianship rights over Z.T. But the exhibit is dated the same day that Z.T. was born. Thus, it appears that mother's desire to vest the maternal grandmother with custody and control of Z.T. was not new, nor was it a change of circumstances—it predated the filing of the section 300 petition and the disposition order. Fairly read, the exhibit raises an inference that it was always mother's desire to have Z.T. placed with the maternal grandmother in the event mother, for any reason, could not care for him. Moreover, mother's interest in having Z.T. placed with the maternal grandmother was made known to DCFS well before the disposition order, and DCFS reported that interest to the juvenile court in its section 366.26 report. Therefore, it was not unreasonable for the juvenile court to conclude that mother's declaration did not present new facts or a change in circumstances.

In addition, there were facts in the record before the juvenile court that supported its conclusion that the requested change in orders would not be in Z.T.'s best interest. The maternal grandmother's criminal record and alleged misrepresentation to DCFS about her employment status supported DCFS's conclusion in the section 366.26 report that placement with the maternal grandmother was a "questionable" proposition, at best. That conclusion, in turn, was a sufficient factual basis upon which the juvenile court could have concluded that a change in Z.T.'s permanent plan at that stage of the proceedings would not have been in Z.T.'s best interests. In addition, Z.T. had lived with the adoptive parents since June 17, 2008, and appeared to have bonded with them. The adoptive home was well located and the adoptive parents were willing and able to

provide the necessary educational and emotional support to Z.T. As such, the juvenile court did not abuse its discretion in denying mother's section 388 request on that basis.

CONCLUSION

The orders of the juvenile court from which mother appeals are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.